Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

ROY E. ESTY, HOBART B. ESTY, HOWARD T. ESTY, and DEBRA A. McDONALD, Executrix of the Estate of BARBARA ROGER,

Petitioners,

v.

UNITED STATES OF AMERICA and COMMONWEALTH OF MASSACHUSETTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1944, the District Court issued a Judgment on Declaration of Taking in the case *United States v. 12,367.47 acres of land in Essex County*. In 1948, the United States, (after a public outcry, especially from returning World War II veterans) passed a statute 62 Stat. 293 (Appendix D) directing the District Court and certain Government officials to exclude certain lots which: (1) were never paid for; and (2) located in the Crane Pond Division, from all condemnation proceedings. All parties agree and all courts found that the locus, lot 95, was never paid for and is located in the Crane Pond Division. The exclusion was to occur within 90 days of June 3, 1948 or within such time as the District Court determined. In 1949, lot 95 was sold by the Town of Groveland, Massachusetts to Ralph Esty. In 1956, in contravention of the statute, the District Court held a compensation hearing on the Crane Pond Division lots, including lot 95. Petitioners, holders of a recorded deed, and paying taxes on lot 95, did not receive notice of the compensation hearing. (Notice was posted in the Clerk of Court's office). After the compensation hearing, property in the Crane Pond Division was sold to the Commonwealth of Massachusetts.

Four questions are presented:

1. If the United States Congress removes certain land from a taking, does the District Court have jurisdiction to thereafter conduct condemnation proceedings over the said land and confiscate the said land from the landowner?

2. If a statute mandates an action, what is the remedy if a court does not order the mandated action?

3. What is the remedy where the District Court holds a compensation hearing without personal notice to the landowner who is easily identifiable from public records and who has defenses to the taking?

4. If the United States Congress passes a statute which forbids the payment of compensation, must the land be returned to the landowner?

LIST OF PARTIES

The parties are listed in the caption. The Commonwealth of Massachusetts is claiming title by virtue of a deed from the United States which was executed more than ten (10) years after passage of 62 Stat. 293.

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OPINION BELOW

The opinion of the United States Court of Appeals is included in the Appendix as Appendix A. The First Circuit affirmed the decision of the United States District Court for the District of Massachusetts. *See* Appendix B.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The First Circuit's decision was rendered on February 18, 2004. The petition for panel rehearing and for panel rehearing with suggestion for Rehearing En Banc was denied on April 8, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States.

Pub. L. No. 80-579. 62 Stat. 293 passed in 1948 hereinafter referred to as 62 Stat. 293.

STATEMENT OF THE CASE

1. In 1944, the United States District Court entered a judgment on Declaration of Taking in this case entitled, *United States v. 12,367.47 acres of land in Essex County*, Misc. Civil No. 7010. That taking included lot 95. Title to Lot 95 was held by the Town of Groveland for unpaid real estate taxes, with a right of redemption in the Estate of William Merrill. Notice of the taking was served by posting a notice on the lot.

The returning World War II veterans raised a clamor about losing their land. *See* legislative history of 62 Stat. 293. The Commonwealth of Massachusetts moved to dismiss the action. Ultimately, a compromise was reached whereby certain land not paid for would be excluded from the taking and certain land that was paid for could be repurchased by the condemned landowner.

This compromise was codified in 62 Stat. 293. 62 Stat. 293 was passed June 3, 1948. Lot 95 was never paid for and was located in the Crane Pond Division and therefore, by the terms of 62 Stat. 293, Lot 95 was required to be excluded. 62 Stat. 293 § 2b states in part:

62 Stat. 293

"An Act
To reduce in area the Parker River National Wildlife Refuge in Essex County, Massachusetts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Parker River National Wildlife Refuge in Essex County, Massachusetts, *is hereby reduced in area by elimination therefrom these portions of the refuge designated and known as the Crane Pond*, Downfall, and Mill Creek Areas, and the Secretary of the Interior is *authorized and directed* to dispose of all of the interests of the United States in such areas in accordance with the provisions of this Act. . . .

(b) With respect to such other lands as lie within the three areas designated in section 1 and are included in the condemnation proceeding or proceedings referred to, and compensation for the taking of which has not been paid to the prior owners thereof, the Attorney General of the United States is *authorized and directed* to *exclude* the same from the condemnation proceedings entitled "United States v. 12,367.47 Acres More or Less of Land Situate in Essex County, Massachusetts, Civil No. 7010, in the District Court of the United States for the District of Massachusetts", or any other condemnation proceeding instituted by the United States for the acquisition of lands for the Parker River National Wildlife Refuge, in accordance with the provisions of the act of October 21, 1942 (56 Stat. 797; 40 U.S.C., Supp. 258f), *within ninety days following the date of enactment of this Act* or within such additional period as the court in such proceeding may determine to be necessary to effectuate the purposes of this Act". . . .

Approved June 3, 1948" (emphasis supplied)

2. In 1949, the Town of Groveland foreclosed the equity of redemption for lot 95 and on July 28, 1949 sold it to Ralph Esty. He took possession of lot 95 and paid taxes upon it.

On September 26, 1949, the District Court issued an order allowing landowners to seek exclusion at any time. One reason for the order was that the United States Attorney needed to update titles to identify some landowners.

In 1953, Ralph Esty deeded the property (lot 95) to his three sons, Howard Esty, Hobart Esty and Roy Esty. They occupied and paid taxes upon the property.

In 1956, the United States held a compensation hearing on lots in the Crane Pond Division. Notice of the hearing was accomplished by posting in the Clerk of Court's office. The petitioner did not receive notice of the hearing.

At the hearing, the owner of Lot 95 was defaulted for not appearing.

In 1959, the United States sold certain lots in the *United States v. 12,367.47 acres* taking to the Commonwealth of Massachusetts.

In 1988, the District Court excluded lot 333 from the taking. The United States never paid for Lot 333 and it was located in the Crane Pond Division. The Commonwealth asserted title to lot 333 by virtue of the 1956 deed. The Massachusetts Land Court ruled that the Commonwealth had no title to lot 333. Neither lot 333 nor lot 95 are identified as lots conveyed to the Commonwealth in the plan that accompanied the 1956 deed.

In 1998, the Estys filed a Motion in the District Court to exclude Lot 95.

The District Court issued a Judgment of Exclusion on February 17, 1999.

In 2001, the Commonwealth moved to vacate the Judgment of Exclusion claiming an interest in lot 95 by virtue of the 1959 deed.

The District Court vacated the Judgment of Exclusion. The Estys' appealed to the First Circuit. The Judgment was affirmed. This appeal followed.

3. In this case, the statute, 62 Stat. 293 removed lot 95 from the taking. All parties agree and the District Court and Circuit Court of Appeals found that Lot 95 is located in the Crane Pond Division and the United States never paid anyone for it. In spite of these findings, the First Circuit ruled that the petitioner's claim is barred by Rule 60 of the Federal Rules of Civil Procedure. The First Circuit never identified what Judgment to which it referred. The First Circuit labelled the attack on subject matter jurisdiction as specious.

REASON FOR GRANTING THE PETITION

Review is necessary because the First Circuit failed to recognize that the jurisdiction of the District Court to hold condemnation proceedings regarding lot 95 in the case of *United States v. 12,367.47* acres was eliminated by 62 Stat. 293. The decision of the First Circuit is inconsistent with a long line of Supreme Court cases which give "immediate effect to statutes that alter a court's jurisdiction." *See Republic of Austria v. Altmann*, __ U.S. __ (2004) (Scalia concurring).

In this case, the District Court and the First Circuit ignored the legislative compromise (62 Stat. 293) which removed certain lots from condemnation proceedings. The Court's review is necessary so that the compromise achieved by citizens in their appeals to Congress are followed.

Given that the District Court held condemnation proceedings after the statute was passed in 1948, it should have provided the landowner with personal notice of these

proceedings including the compensation hearing that was held in 1956. Over 160 lots were excluded between 1948 and 1961. One lot was excluded in 1988. It is clear, that had the petitioners received notice of the 1956 proceedings, they could have successfully addressed them and the land (lot 95) would have been removed from the taking.

The Circuits are divided as to the remedy available to the landowners if the landowner is not given notice of the compensation hearing.

I. Review Is Necessary Because The Decision Of The First Circuit Is Inconsistent With Prior Decisions Of This Court Regarding Implementation Of Statutes Affecting Jurisdiction.

The First Circuit ruled that the District Court retained jurisdiction over lot 95 even though the statute 62 Stat. 293 passed in 1948 "authorized and directed" certain lots (including lot 95) to be removed from any condemnation proceedings. The First Circuit is in error. Congress clearly has the power to control the jurisdiction of the District Court. *Hallowell v. Commons*, 239 U.S. 506, 509 (1916). Congress removed the District Court's power to act on lot 95. Therefore, its jurisdiction over lot 95 was eliminated.

In the case of *Republic of Austria v. Altman*, __ U.S. __ (2004), Justice Scalia stated in his concurring opinion, that "I noted our 'consistent practice of giving immediate effect to statutes that alter a court's jurisdiction.' I explained this on the ground that 'the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power' . . ."

Therefore, the District Court had no power to issue any Judgment regarding lot 95 after 1948 (other than to exclude it). Rule 60 cannot be a defense if the Court does not have subject matter jurisdiction.

II. Review Of This Case Is Necessary Because The District Court And First Circuit Did Not Provide A Remedy For Not Doing The Actions Mandated By 62 Stat. 293.

The issue is what is the remedy when the District Court does not adhere to a statute which mandates certain action.

In *Bauman v. Ross*, 167 U.S. 548 (1897), an eminent domain statute required the exclusion of certain land from a taking within a certain time period. The Supreme Court held that once that time period expired, the land was deemed excluded. In fact, in this case, lot 95 was the subject of two conveyances between 1948 and 1956 as if it were excluded.

In a similar case, though not about eminent domain, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), the Supreme Court held that where a mandatory time period expires, and there is no sanction in the statute, the remedy is to do the mandated action.

The concern raised by Justice Scalia in the *Barnhart* case is not present here. Justice Scalia stated that because an action was required to be accomplished within a certain period the court could not order it done after the expiration of that time period. 62 Stat. 293 specifically allows the District Court to extend the deadline. In 1949, the District Court extended the date for exclusion indefinitely. The District Court excluded lot 333 in 1988. Lot 333 had never been paid for and was located in the Crane Pond Division.

The First Circuit's decision is in error and the mandated action (exclusion of lot 95) should now occur.

III. Review Is Necessary Because Of A Conflict Among The Circuits As To The Remedy When A Landowner Does Not Receive Notice Of A Compensation Hearing.

The case of *Walker v. City of Hutchinson Kansas*, 352 U.S. 112 (1956) requires personal notice of a taking upon a landowner. The case of *Caitlin v. United States*, 324 U.S. 229 (1945) allows a condemned landowner to challenge the statutory basis at a compensation hearing.

The question presented in this case is this: What is a landowner's remedy when the Court holds a compensation hearing, does not give the landowner personal notice and the landowner has a defense to the taking.

Clearly, if the Estys were given notice of a compensation hearing, the court would have been constrained to exclude lot 95 from the taking in accordance with 62 Stat. 293. It did, in fact, exclude one hundred sixty (160) other lots at various times in the litigation.

There is a dispute among the Circuits as to how to address that lack of notice of the compensation hearing.

The remedy set out in this case by the First Circuit for the United States' failure to provide a landowner notice of a compensation hearing, is that the landowner's rights to a compensation hearing and to challenge the statutory basis of the taking can be lost by reason of Rule 60 of the Federal Rules of Civil Procedure.

The First Circuit addresses this issue in two other cases, *United States v. 125.2 acres*, 732 F.2d 239 (1st Cir. 1984) and *United States v. Lombard*, 356 F.3d 151 (1st Cir. 2004).

In both of these cases, landowners claimed that they were not given personal notice of the taking. In the *125.2 acres* case, the First Circuit declined to upset the taking and remanded this case back for a compensation hearing on damages only. The *Lombard* case refused to upset the taking, ruling that the state court procedures, which did not include personal notice to potential aggrieved landowners, were sufficient. The Fourth Circuit agrees with the First Circuit, *United States v. Fulcher*, 632 F.2d 278 (4th Cir. 1980).

The Seventh Circuit has held that if a potential landowner is not included in a taking, the United States takes no title at all. *United States v. 88.28 acres of land*, 608 F.2d 708 (7th Cir. 1979). In other words, if a landowner is not made part of the compensation proceedings, he is not bound by the result. *Id.*

The Fifth and Eighth Circuits take the position that due process requires that the landowner be given personal notice of a compensation hearing including the right to challenge the statutory basis for the taking set out in *Caitlin v. United States*, 324 U.S. 229 (1945) before any judgment can bind the landowner.

The Fifth Circuit decision is found in *United States v. 194.08 acres of land*, 135 F.3d 1025 (5th Cir. 1998) and the Eighth Circuit is *United States v. Herring*, 750 F.2d 669 (8th Cir. 1984). The *Herring* decision set out the three alternatives mentioned above, namely: (1) the landowner's right to a compensation hearing can be lost and the government title is indefeasible; (2) The government takes no title if the landowner is not given personal notice; and (3) the government takes title subject to the compensation hearing in which the landowner can challenge the taking.

The Eighth Circuit concluded that the United States takes title upon the Judgment of Taking but that due process requires that the landowner be given personal notice of a compensation hearing with the ability to raise an defense to the taking at that hearing. *Id.* at 674. The United States title is not indefeasible until the landowner has had notice and the opportunity for a hearing. *Id.*

The First Circuit's remedy for failure of the government to provide notice of a compensation hearing was to rule that no compensation hearing could be held. This result is inconsistent with the law as set out by the Fifth, Seventh and Eighth Circuits. Furthermore, the First Circuit itself has held that judgments that work denial of due process, should not be protected by Rule 60. *See United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990).

The Estys would benefit from a hearing, as the statutory basis for the taking was repealed before any compensation hearing was held.

IV. Review Is Necessary Because The Land Must Be Excluded Since 62 Stat. 293 Forbids The Payment Of Compensation.

62 Stat. 293 required the District Court to remove lot 95 from all condemnation proceedings. Consequently, the District Court had no power to set a compensation amount. Lot 95 had to be removed from the taking and returned to the landowner because the United States had no power in law to pay for lot 95.

CONCLUSION

Review is necessary because the First Circuit did not give effect to a statute which altered jurisdiction and mandated certain court action.

Alternatively, review of this case is necessary to resolve a conflict among the Circuits as to the remedy of landowners whose land is condemned, who have a reasonable chance to defeat the taking at a compensation hearing, and who have not been given personal notice of the compensation hearing to address the government's ability to take their land.

The First Circuit is in error when it ruled that the United States has the power to deprive these citizens of their land in light of a statute which prohibits that exact result. If the First Circuit is correct that it retained jurisdiction, then personal notice was required and a compensation hearing should now be held. Petitioners request that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 18, 2004

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03-1701

February 18, 2004

UNITED STATES,

Plaintiff,

COMMONWEALTH OF MASSACHUSETTS,

Intervenor, Appellee,

v.

ROY E. ESTY; HOBART B. ESTY; HOWARD T. ESTY,

Defendants, Appellants,

12,367.47 ACRES OF LAND, MORE OR LESS, LOCATED IN ESSEX COUNTY MASSACHUSETTS,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Appendix A

Per Curiam. Appellants initiated proceedings to gain title to a property fifty-three years after the United States condemned it and nearly forty years after the federal government transferred title to the Commonwealth of Massachusetts. Their procedural vehicle for this relief is Fed. R. Civ. P. 60(b). Agreeing with the district court that the appellants' request for relief is too late, we affirm.

I.

We provide a brief overview of the historical facts, which are not materially in dispute. The United States created the Parker River National Wildlife Refuge in Essex County, Massachusetts in 1945 by acquiring property through eminent domain. *See United States v. 12,367.47 Acres of Land More or Less Situated in Essex County, Massachusetts,* Civil No. 7010 (D.Mass. Jan. 2, 1945). Before the government could finish compensating all of the landowners whose property had been taken, Congress passed the 1948 "Exclusion Act," Pub. L. No. 80-579, 62 Stat. 293, to reduce the size of the wildlife refuge. The Exclusion Act directed the Secretary of the Interior to "dispose of all of the interests of the United States" in certain identified plots of land that had been acquired through the earlier condemnation proceedings. If the previous owners had already been paid for the property, Section 2(a) of the Act entitled them to regain ownership by returning the funds to the United States. If the owners had not been paid, Section 2(b) directed the Attorney General to return title to the former owners within ninety days or "within such additional period as the court in such proceeding may determine to be necessary to effectuate the purposes of [the] Act." If the government could not locate the former

owners or if title could not be returned under Sections 2(a) or 2(b) for any other reason, Section 2(c) mandated that the property "be disposed of in such manner and at such prices as the Secretary of the Interior may deem to be in the best interests of the United States." The United States Attorney's office developed a plan, with the district court's approval, for implementing the Exclusion Act. This plan was designed to return property to any former owner who filed a "stipulation for exclusion," to pay just compensation—as determined by the court—to the former owners who preferred money instead of their property, and to provide sufficient time to locate the owners whom the government was not able to contact.

The district court, upon motion by the United States Attorney, extended four times (on September 2, 1948; March 1, 1949; September 26, 1949; and March 15, 1956) the deadlines by which former landowners could elect to exclude their property from the taking. On June 4, 1959, the United States Department of the Interior, exercising its authority under Section 2(c) of the Exclusion Act, sold all of the property covered by the Act but not excluded by former owners to the Commonwealth of Massachusetts Division of Fisheries and Game.

The property at issue in this case, a 23 acre plot located in Groveland, Massachusetts and referred to by the parties as "Lot 95," was owned by the estate of the late William Merrill prior to the taking by the United States in 1945. The federal government had not compensated Merrill when Congress passed the Exclusion Act in 1948, and the U.S. Attorney had not received an election from the Merrill

estate pursuant to the Exclusion Act prior to the June 4, 1959 sale. Therefore, Lot 95 was included with the unclaimed properties that the United States transferred to the Commonwealth in 1959. That land is now included within a wildlife management area operated by the Commonwealth.

In June 1949, more than four years after the United States had acquired title to Lot 95, the Town of Groveland attempted to take title to Lot 95 from the Merrill Estate by purportedly foreclosing a preexisting tax lien on the lot. On June 30, 1949, the town transferred at auction the putative title to the lot to Ralph A. Esty,[1] a town selectman, a life long resident of Groveland, and the owner of the Ralph A. Esty and Sons lumber company. Esty sold the property to his sons, the appellants, in 1953. Although the sons paid taxes on the property for a few years, they stopped paying taxes approximately forty-four years ago.

The appellants failed to object to either the federal taking or the transfer of Lot 95 to the Commonwealth until 1998, fifty-three years after the district court issued its judgment of taking and nearly forty years after the United States transferred title to the Commonwealth. Nevertheless, in 1998, the appellants filed a "Motion to Exclude Lot 95 or to Vacate Judgment Regarding Lot 95" in the district court. The United States, apparently believing that it still owned the property, stipulated to the exclusion without notifying the Commonwealth, and the court issued a Judgment of Exclusion on February 17, 1999.

1. Esty had experience with the federal taking and the related exclusion process since, as a town official, he had participated in proceedings to exclude another lot under the Exclusion Act.

Appendix A

The Commonwealth subsequently objected to this judgment in a November 8, 1999 letter, stating that it had not received any notice of either the stipulation or the district court action. On May 1, 2001, the United States moved to vacate the Judgment of Exclusion under Fed.R.Civ.P. 60(b), and it entered a joint motion with the Commonwealth to allow the Commonwealth to intervene. The court granted both motions on August 1, 2001. On April 9, 2003, the court granted summary judgment "to the Commonwealth against the claim of the Estys (as set forth in the Estys' 'Motion to Exclude Lot 95 or to Vacate Judgment Regarding Lot 95')." In the body of its opinion, the district court ruled that "[b]ecause the Estys did not have an interest in Lot 95 at the time of the taking, they may not invoke the Exclusion Act to void the sale of Lot 95 to the Commonwealth. Moreover, I find the period of Exclusion was properly terminated by [the district court] in 1959." In footnote 1 of its opinion, the district court set forth an alternative ground for its ruling:

> Given (a) the length of the Estys' delay, (b) the lack of justification, and (c) the prejudicial disruption of the Commonwealth conservation efforts at the locus for the past more than 40 years, I find no extraordinary circumstances justifying invocation of Rule 60(b) in this setting to divest the Commonwealth of its title in Lot 95. Although we agree with the district court's analysis of the merits of the Estys' claim in its summary judgment ruling, we choose to focus our

brief comments of affirmance on the court's ruling under Rule 60(b).[2]

II.

Fed.R.Civ.P. 60(b) allows a court "[o]n motion and upon such terms as are just, [to] relieve a party ... from a final judgment." Pursuant to the subsections of Rule 60(b) not limited by the requirement of filing "not more than one year after the judgment, order or proceeding was entered or taken," the motion must be made within a "reasonable time." Fed.R.Civ.P. 60(b)(4)-(6). "What is 'reasonable' depends upon the circumstances of the particular case. The circumstances to be considered include the length of the delay, the justification for it, and the prejudice (if any) associated with the granting of relief." *Farm Credit Bank v. Ferrera-Goitia,* 316 F.3d 62, 66 (1st Cir.2003) (citation omitted). The appellants waited thirty-nine years after the United States transferred title to the Commonwealth to file their motion. By any measure, that is an exceptionally long delay. When the appellants finally chose to file their Rule 60 motion, they neither claimed that they were unaware of the

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2. The United States also relied on Rule 60(b) to vacate the Judgment of Exclusion that had been entered before the Commonwealth became involved in these proceedings. The appellants claim that the district court abused its discretion by considering this motion. Since they only dedicated a paragraph to this claim in their appellate brief and failed to develop any argument, we consider this claim to be waived. *See United States v. Bongiorno,* 106 F.3d 1027, 1034 (1st Cir.1997) ("We have steadfastly deemed waived issues raised on appeal in a perfunctory manner, not accompanied by developed argumentation.").

Commonwealth's claim of ownership nor that their ability to file this motion in a more timely fashion was impeded in some way. In fact, they failed to provide any explanation or excuse for their long delay.[3] The prejudice to the Commonwealth if it were divested of title to Lot 95 is clear. It has relied on the title that it acquired from the United States for the past forty-five years, through its operation of a wildlife management area. In sum, we have seldom seen a weaker claim for 60(b) relief.

Affirmed.

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3. The appellants try to avoid the need to explain their delay by invoking a specious subject matter jurisdiction argument, apparently on the theory that subject matter jurisdiction can be raised at any time. Subject matter jurisdiction concerns the " 'power [of the court] to declare the law' " in the dispute before it. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 1998) (quoting *Ex parte McCardle,* 7 Wall. 506, 514 (1868)). The appellants argue that the 1948 Exclusion Act stripped the federal district court of the "power to do anything with Lot 95 except exclude it from the taking." This argument does not implicate the district court's subject matter jurisdiction in the 1950s in dealing with Lot 95; it is an ordinary and misguided statutory interpretation argument addressed to the merits of the court's decision.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED APRIL 9, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 98-11665-DPW

UNITED STATES OF AMERICA

Plaintiff,

v.

12, 367.47 acres of lands, more or less located in Essex County, Massachusetts

Defendant,

HOBART B. ESTY, ROY E. ESTY, and HOWARD T. ESTY

Defendants,

and

COMMONWEALTH OF MASSACHUSETTS,

Intervenor.

Appendix B

MEMORANDUM AND ORDER

April 9, 2003

At issue in this proceeding is whether a 1959 sale of land by the federal government to the Commonwealth of Massachusetts will be respected. The parcel was included in the 1945 federal taking directed by the Congress to create the Parker River National Wildlife Refuge in Essex County, Massachusetts. The parcel was also subject to a 1948 statute designed to reduce the area of the Refuge by eliminating certain sections of the 1945 taking. Over a half century after the federal taking was recorded, a competing claimant came to this court seeking to establish ownership in this parcel. I decline to divest the Commonwealth of the property it purchased from the federal government over forty years ago.

I. THE PROPERTY AND ITS DISPOSITION IN *UNITED STATES v.* 12,367.47 MORE OR LESS OF LAND SITUATED IN ESSEX *COUNTY, MASSACHUSETTS,* NO. 7010 (D. MASS. JAN. 2, 1945)

The Groveland, Massachusetts, property involved in this action, Lot 95, was included in the Crane Pond portion of the Refuge. Lot 95 was owned by William Merrill when he died in 1937. There are two lines of interest in the property. One flows from the action of the Town of Groveland, which in 1939 took a tax title deed in Lot 95 for taxes unpaid by Merrill and his representatives. The other flows from the action of the United States in 1945 taking Lot 95 by eminent domain for the Parker River National Wildlife Refuge, as

reflected by the Judgment of Declaration of Taking (the "Judgment") issued by this Court on January 2, 1945 in the eminent domain proceeding styled *United States v. 12,367.47 More or Less of Land Situated in Essex County, Massachusetts*, No. 7010 (D. Mass. Jan. 2, 1945).

In 1948, Congress enacted a statute, Pub. L. No. 80-579, 62 Stat. 293, reducing the area taken in the Refuge by eliminating the Crane Pond Area, including Lot 95. Section 2(b) of the 1948 Act (the "Exclusion Act") "authorized and directed" the Attorney General of the United States to exclude from the pending condemnation proceeding lands for which compensation had not been paid "to the prior owners thereof." The United States had not paid compensation for Lot 95 before the effective date of the Exclusion Act in 1948 and, indeed, has never paid anyone compensation for Lot 95.

In 1949, the Town of Groveland recorded an affidavit to foreclose the tax title in Lot 95 and a deed purporting to grant Lot 95 to Ralph A. Esty in consideration of two hundred dollars. Ralph A. Esty was a member of the Board of Selectmen for the Town of Groveland. He was familiar with the exclusion mechanism established by the 1948 Act. Nine months earlier he had executed a stipulation of exclusion with respect to another parcel of land which, like Lot 95, had been taken in 1945 for the Refuge and released by the 1948 Act.

In 1952, this Court ordered that the owner of Lot 95 be served with an order of notice regarding the exclusion. In 1953, the U.S. Marshal made hand service on the heirs of William Merrill by serving their attorney of record, Robert

F. Metcalf; on the Tax Collector and Town Treasurer of Groveland; and on the Massachusetts Commissioner of Corporations and Taxation.

In 1953, Ralph Esty executed a deed to Lot 95 to his three sons, the Estys, as joint tenants. The Estys paid taxes on Lot 95 for fiscal year 1955. It appears, although no documentation has been adduced, that they also paid taxes on Lot 95 for several years thereafter.

On March 20, 1956, there was a compensation hearing in this Court for the Crane Pond Division and neither the heirs of William Merrill nor the Estys appeared at that hearing. Final judgment was entered by Judge Aldrich fixing just compensation for Lot 95 at $368.95. Apparently, no one has claimed any portion of this amount.

In February 1959, Judge Aldrich entered an order terminating "the period for exclusion of condemned lands." On June 1959, the United States conveyed land, including Lot 95, from the 1945 taking to the Commonwealth of Massachusetts.

Since 1959, the Commonwealth has maintained Lot 95 as a wildlife management area for conservation purposes. The Estys have not paid taxes on Lot 95 since 1960.

II. THE CURRENT PROCEEDING

In 1998, the Estys applied to this Court, apparently without notice to the Commonwealth, "to exclude Lot 95 or to vacate judgment regarding Lot 95." In the absence of

objection by the United States, which, in fact, undertook to stipulate to exclusion but apparently failed to provide notice to the Commonwealth of Massachusetts to which it had conveyed its interest in Lot 95 nearly four decades earlier, I issued a Judgment of Exclusion on March 31, 1999. After the Commonwealth learned of this Judgment of Exclusion, Assistant Attorney General Irene Guild sent a letter to Arthur K. Ross, counsel to the Estys, stating that the Commonwealth was asserting title to Lot 95. I thereafter vacated the Judgment of Exclusion and permitted the Commonwealth to intervene in this case. The Commonwealth has presented a motion for summary judgment to establish its right to Lot 95.

III. DISCUSSION

Now having been presented with an adversarial context in which to address this matter, I find that the Estys stumble at the threshold because they do not have an interest in Lot 95 recognized under the applicable federal statutes. I find the federal government did have such an interest which it could and did properly transfer to the Commonwealth in 1959 following the termination of the decade-long period for exclusion. Under the circumstances, the Estys' claim does not justify disturbing the Commonwealth's interest more than forty years after it was validly acquired.

A. The Source of the Interest the Estys' Claim Was Extinguished in 1945

In the motion initiating this action, the Estys sought exclusion of Lot 95 froth the taking. This relief necessarily

requires vacating the 1959 order terminating the period for exclusion. Putting to one side the question whether a proper procedural vehicle exists by which such relief may be obtained,[1] I turn first to Estys' claim that they have been record title holders of Lot 95 since 1949.

The heirs of William Merrill held a right of redemption for Lot 95 at the time of the 1945 taking, while the Town of Groveland held tax title to the lot. Consequently, I confront the question whether the taking extinguished that tax title by vesting full fee simple title to Lot 95 in the United States.

In Massachusetts, the holder of a tax title is a lien holder until the right of redemption is extinguished. *Brown v. City of Boston*, 353 Mass. 740, 742-43 (1968). Unless and until that right is extinguished, the holder of the right of redemption is considered the owner of the property. *Id.* at 743.

Under the federal Declaration of Taking Act, 40 U.S.C. § 258a, title in fee simple absolute, or in any lesser interest

1. Although they do not indicate explicitly the procedural vehicle they-are purporting to deploy, the Estys are presumably pursuing their claim through Fed. R. Civ. P. 60(b). But even the open-ended subsections of Rule 60 (b) require filing within a reasonable time. *See generally Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 66 (1st Cir. 2003). Given (a) the length of the Estys' delay, (b) the lack of justification, and (c) the prejudicial disruption of the Commonwealth conservation efforts at the locus for the past more than 40 years, I find no extraordinary circumstances justifying invocation of Rule 60 (b) in this setting to divest the Commonwealth of its title in Lot 95. *See generally Claremont Flock Corp. v. Alm*, 281 F.3d 297 (1st Cir. 2002).

or estate specified in the declaration of taking, vests in the United States upon the filing of a declaration of taking and the depositing in the court of funds marked as just compensation for the prior owners of the lands condemned. 40 U.S.C. 258a; *see United States v. 125.2 Acres of Land*, 732 F.2d 239, 242-43 (1st Cir. 1984) (citing *United States v. Miller*, 317 U.S. 369 (1943)). Once the United States acquires fee simple title to land "[t]he fact that the land may be subject to a lien has no bearing on the condemnation." *Washington Water Power Co. v. United States*, 135 F.2d 541, 543 (9th Cir. 1943) (concluding that the United States does not have to pay the taxes that existed on land it condemned); *see United States v. 111,000 Acres of Land*, 155 F.2d 683, 686 (5th Cir. 1946) (holding the United States not liable for taxes due on land taken by eminent domain); *accord Collector of Taxes v. Revere Building, Inc.*, 27G Mass. 57G, 580 (1931) (stating that a lien for taxes upon land is purely statutory and Is extinguished by the taking of land by eminent domain by the taxing municipality) (citations omitted).

The Town of Groveland did not file an affidavit in the Essex Registry of Deeds to foreclose tax title of Lot 95 until 1949. At the time of the federal taking, the Town of Groveland had not extinguished the right of redemption held by the Merrill heirs. For that reason, I find that the heirs of William Merrill, and not the Town of Groveland, owned Lot 95 at the time of the taking in 1945. Fee simple title to Lot 95, subject to several easements but free of liens and encumbrances, vested in the United States on January 2, 1945. Accordingly, I find that the Town of Groveland's tax lien on Lot 95 was extinguished at that time and that the Town of Groveland did not have an interest in Lot 95 at the time of the

conveyance to Ralph Esty. Therefore, Ralph Esty had no interest to convey to his sons in 1953.

B. This Court Properly Terminated the Power to Exclude Lot 95

Section 2(b) of the 1948 Exclusion Act authorized and directed the Attorney General of the United States to exclude from the taking certain lots for which compensation had never been paid, in accordance with 40 U.S.C. § 258f, "within 90 days following the date of enactment of this Act or within such additional period as the court . . . may determine to be necessary to effectuate the purposes of this Act." Pub. L. No. 80-579, § 2(b), 62 Stat. 293.

The Estys contend that the Act required the Attorney General of the United States to exclude Lot 95 from the taking because the United States never paid compensation for that lot. Consequently, they argue the United States District Court had no power to do anything with Lot 95 except exclude it from the taking. Under these circumstances, they contend, "it is impossible as a matter of law for Lot 95 to have been conveyed by the Commonwealth."

The plain language of the Act contradicts the Estys' assertion that exclusion was the only disposition it contemplated. Section 2(c) provides that if title could not be returned to the prior owners, then the Secretary of the Interior "shall" dispose of such lands "in such manner and at such prices" as he deems in the best interests of the United States. Pub. L. No. 80-579, § 2(c), 62 Stat. 293. Commonsense also supports this reading: if only exclusion were allowed, then

title to many tracts of land in the taking would remain in limbo until increasingly remote owners applied to the court for exclusion. The Estys, for example, waited nearly forty years before they took action. This approach does not encourage the stability necessary for orderly and productive use of land. Furthermore., the inclusion of the word "prices" in Section 2(c) contemplates sale as an allowable method of disposition. Consequently, I find that exclusion was not the only disposition allowed by the Act with respect to land for which compensation had not yet been paid. Sale at a price the Secretary deemed in the best interest of the United States was also available when, after over a decade, no record holder of an interest in Lot 95 at the time of the taking had come forward to seek exclusion. I decline to accept the Estys' argument that the Secretary did not have the power to sell Lot 95 to the Commonwealth in 1959.[2]

IV. CONCLUSION

Because the Estys did not have an interest in Lot 95 at the time of the taking, they may not invoke the Exclusion Act to void the sale of Lot 95 to the Commonwealth. Moreover, I find the period of Exclusion was properly

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2. I note that the aberrational case of *Prescott v. Watt*, No. 82-2357-MC (D. Mass. Mar. 8, 1988) is distinguishable. The claimants there asserted an interest from a "prior owner" who had apparently received no notice of the taking. In any event, the *Prescott* case was resolved not through litigation on the merits but by stipulation of the United States, after the Commonwealth had been dismissed from the case, when Judge Aldrich allowed an agreement for judgment divesting title to Lot 333 from the United States and revesting it in the condemnees.

terminated by Judge Aldrich in 1959. I find no reason to disturb the Commonwealth's interest in Lot 95. Accordingly, I grant summary judgment to the Commonwealth against the claim of the Estys (as set forth in the Estys' "Motion to Exclude Lot 95 or to Vacate Judgment Regarding Lot 95") and dismiss as moot the Commonwealth's counterclaim.

It is further Ordered that the parties provide the court on or before April 22, 2003, with a joint status report, proposing what further action, if any, is necessary to dispose of the outstanding claim of the Rogers to Lot 312.

s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING ENTERED APRIL 8, 2004

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03-1701

UNITED STATES

Plaintiff - Appellee

COMMONWEALTH OF MASSACHUSETTS

Intervenor - Appellee

v.

ROY E. ESTY; HOBART B. ESTY; HOWARD T. ESTY

Defendants - Appellants

12,367.47 ACRES OF LAND, MORE OR LESS, LOCATED IN ESSEX COUNTY MASSACHUSETTS

Defendants

Appendix C

Before

Boudin, *Chief Judge*,
Coffin, *Senior Circuit Judge*,
Torruella and Selya, *Circuit Judges*,
Lynch, Lipez and Howard *Circuit Judges*.

ORDER OF COURT

Entered: **April 8, 2004**

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be *denied*.

By the Court:
RICHARD CUSHING DONOVAN, Clerk

By: s/ MARK R. SYSKA
Chief Deputy Clerk

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall ... be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

62 STAT. 293

An Act
To reduce in area the Parker River National Wildlife Refuge in Essex County, Massachusetts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Parker River National Wildlife Refuge in Essex County, Massachusetts, is hereby reduced in area by elimination therefrom these portions of the refuge designated and known as the Crane Pond, Downfall, and Mill Creek Areas, and the Secretary of the Interior is ***authorized and directed*** to dispose of all the interests of the United States in such areas in accordance with the provisions of this Act. . . .

* * *

(b) With respect to such other lands as lie within the three areas designated in section 1 and are included in the condemnation proceeding or proceedings referred to, and compensation for the taking of which has not been paid to

the prior owners thereof, the Attorney General of the United States is ***authorized and directed*** to ***exclude*** the same from the condemnation proceedings entitled "United States v. 12,367.47 Acres More or Less of Land Situated in Essex County, Massachusetts, Civil No. 7010, in the District Court of the United States for the District of Massachusetts", or any other condemnation proceeding instituted by the United States for the acquisition of lands for the Parker River National Wildlife Refuge, in accordance with the provisions of the act of October 21, 1942 (56 Stat. 797; 40 U.S.C., Supp. 258f), ***within ninety days following the date of enactment of this Act*** or within such additional period as the court in such proceeding may determine to be necessary to effectuate the purposes of this Act". . . .

Approved June 3, 1948

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